ADJUSTMENT OF STATUS

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I. Introduction: Adjustment in the Context of the Immigration Process

Adjustment of status is the primary process for an individual to obtain permanent resident status without leaving the United States.

Most applicants apply for adjustment of status affirmatively with US Citizenship and Immigration Services (hereinafter CIS) outside of the Immigration Court. However, once an individual is placed in removal proceedings, jurisdiction over the adjustment shifts to the Immigration Judge (except for arriving aliens). 8 CFR § 1245.2(a)(1). Thus, in the Immigration Court, we see individuals who are applying for adjustment of status as a form of relief from removal. Some of these are initial applications. Others are applications that have already been denied by CIS and which are being renewed in the Immigration Court.

In addition, adjustment of status is available to some individuals who have already been granted permanent residence, but who have become removable. They may seek to re-adjust their status to overcome certain grounds of removability. See INA § 245(a).

It is important to note that adjustment of status is the term of art for the process of applying for permanent resident status inside the United States. Adjustment of status applications are adjudicated by CIS officers or by Immigration Judges. If the applicant is outside the United States, the procedure is called consular processing or immigrant visa processing. This process culminates in the issuance or denial of an immigrant visa by a consular officer who is an employee of the US Department of State.

Whether the intending immigrant is inside the United States or outside the United States, the process of immigration usually begins with the filing of an immigrant visa petition. This petition is adjudicated by CIS and classifies the individual under the appropriate category of family or employment based visas. Immediate relatives (spouses, parents and children of US citizens) are exempt from immigration quota restrictions. INA § 201(b)(2)(A)(i). All others must wait in line in the appropriate preference category for family or employment-based immigration. For those who must wait in line for a visa to become available, the priority date (or place on the waiting list) is the date that the visa petition is filed with CIS. For employment-based immigrants, the priority date is the date that the underlying application for labor certification is filed with the US Department of Labor or the date the visa petition is filed, if no labor certification is required.

In any case, once the priority date is established, the intending immigrant must wait for it to become "current" as shown on the Visa Bulletin issued by the Department of State. This means that he or she does not have to wait any longer on the quota waiting list and the applicant may proceed to the final stage of the case. This is the application for adjustment of status, if the applicant is inside the U.S., or the application for an immigrant visa, if he or she is outside the U.S. It is at this point in the process that every applicant, whether for adjustment of status or an immigrant visa, is screened according to the grounds of inadmissibility which are listed in

section 212(a) of the INA. If the applicant is inadmissible under one of the grounds in section 212(a), he or she must file and qualify for the corresponding waiver of inadmissibility (if one exists) or face denial.

The eligibility criteria for the waivers are the same whether the individual is seeking adjustment of status inside the U.S. or applying for an immigrant visa at a U.S. consulate outside the U.S. However, this paper will discuss the waivers in the context of adjustment of status.

II. Threshold Eligibility for Adjustment of Status

Adjustment of status is governed by section 245 of the INA. INA Section 245(a) contains three basic eligibility requirements for adjustment of status. Applicants must:

1. have been inspected and admitted or paroled (except VAWA self-petitioners);
2. be eligible and admissible for permanent residence; and
3. an immigrant visa number must be immediately available to him/her.

Each of these requirements will be discussed below.

A. Inspected and Admitted or Paroled

This requirement means that the adjustment applicant must have been legally admitted or paroled by an immigration officer a port of entry. This requirement is usually met by submitting documentary evidence, such as a copy of the I-94 card showing the date of inspection and the category of admission. If he or she has lost the entry documents, he/she may apply to CIS for a replacement I-94 and the I-94s are now available online. It may also be met by a copy of the passport with an admission stamp, copies of other documents that may have been used for entry such as a border crossing card, and through testimonial evidence.

A respondent may also meet this requirement by showing that he/she was "waived-in" at the border. See Matter of Areguillin, 17 I&N Dec. 308, 310 (BIA 1980). This requires that the respondent prove "procedural regularity" of his or her entry, but does not require that the respondent have been questioned by immigration officials or admitted in a particular status. Id.; see also Matter of Quilantan, 25 I&N Dec. 285, 289 (BIA 2010). In removal proceedings, the judge may hold a special hearing and take testimony to resolve this issue.

B. Eligible for a Visa and Not Inadmissible

This requirement essentially means that the applicant is not subject to the grounds of inadmissibility listed in section 212(a) of the INA. These include criminal convictions, fraud, prior immigration violations, and many more. See INA § 212(a).

If the adjustment applicant is subject to one of the grounds of inadmissibility, he or she must be eligible for the corresponding waiver or he/she will be ineligible for adjustment of status. The waivers are usually referenced in section 212(a) in the same section that describes the ground of inadmissibility. Thus, for example, section 212(a)(1) describes the health grounds

of inadmissibility and references the corresponding waiver of this ground (found in 212(g)). Thus a close reading of section 212(a) is a good place to start when trying to figure out whether there is a waiver available for a particular ground of ineligibility. The most common waivers will be discussed below.

C. Visa Immediately Available

This is the third basic requirement for adjustment of status. This means either that the priority date is current or that the applicant is immigrating in a category for which there is no waiting list (e.g., immediate relatives). See INA § 245(a).

For preference immigrants, the visa must be available at the time the adjustment application is filed. Id. To determine whether a visa number is currently available, we must consult the Visa Bulletin which is published monthly by the U.S. Department of State. See Visa Bulletin TRAVEL.STATE.GOV.

This is an example of the section of the Visa Bulletin which pertains to family-based immigration:

Visa Bulletin Final Actions Dates for January 2018

Family-Sponsored	All Chargeability Areas Except Those Listed	CHINA-mainland born	INDIA	MEXICO	PHILIPPINES
F1	15MAR11	15MAR11	15MAR11	01MAY96	01JAN05
F2A	01FEB16	01FEB16	01FEB16	01JAN16	01FEB16
F2B	01DEC10	01DEC10	01DEC10	15AUG96	01JUL06
F3	08OCT05	08OCT05	08OCT05	15JUN95	15MAR95
F4	22JUN04	22JUN04	15DEC03	01NOV97	01SEP94

It is not uncommon for the visa to become unavailable after the adjustment application is filed. This is because the Visa Office at the Department of State adjusts the dates on the Visa Bulletin every month, taking into consideration the worldwide demand and the annual quotas for each preference category. However, a visa number must be available at the time the adjustment application is adjudicated. This rule applies equally to adjustment applications which are adjudicated by CIS and to those adjudicated by an Immigration Judge. This is rarely a contested issue in adjustment cases before the Immigration Court.

III. INA Section 245(c)—Grounds of Disqualification for Adjustment

This section of the statute lists several grounds of disqualification for adjustment of status. INA § 245(c). These grounds include unauthorized employment and failure to maintain nonimmigrant status. Id. These grounds may disqualify many potential applicants who meet the three basic requirements for adjustment in section 245(a). The disqualifications listed in section 245(c) are the principal reasons why family-based adjustment of status is generally limited to immediate relatives and those who are grandfathered under section 245(i) (discussed below).

As you can see from the Visa Bulletin, many of the preference categories are backlogged. Thus, it may take several months or years for an individual's priority date to become current. Many of the individuals who are in the United States waiting for their priority dates to become current (and who are not in a work-authorized status) have either worked without authorization or fallen out of status by the time their priority date becomes current. Immediate relatives (spouses, parents and children of US citizens) are automatically forgiven for these violations in section 245(c). Most other individuals are not. VAWA self-petitioners and special immigrants are also exceptions. INA § 245(c).

The only one of the 245(c) bars that applies to immediate relatives is entry as a crewman. Id. Otherwise, the plain language of this section indicates that the grounds of disqualification listed in section 245(c) do not apply to immediate relatives. Id.

Thus, an initial focus on section 245(c) may be the quickest way to resolve the question of eligibility for adjustment of status, without having to delve into the more complex issues discussed below.

IV. Special Immigration Juvenile Status

This provision allows an individual to adjust if she or he is granted a self-petition, pursuant to section 101(a)(27)(J) of the Act. Individuals who are applying to adjust under this section are deemed paroled into the country, and need not show admission and inspection. In addition, many of the inadmissibility grounds do not apply. See INA § 245(h); see also INA § 212(a)(4), (a)(5)(A), (a)(6)(C), (a)(6)(D), (a)(7)(A), (a)(9)(B). Others may be waived for humanitarian purposes, family unity, or when it is otherwise how m in the public interest.

V. Forgiveness Provisions which Enable Adjustment

Section 245 contains two provisions which enable people to adjust status who would otherwise by disqualified due to entry without inspection, failure to maintain nonimmigrant status, and/or unauthorized employment.

A. INA Section 245(i)

This is an ameliorative provision which enables an individual to pay a $1000 penalty to qualify for adjustment of status despite having entered without inspection or being within one of the grounds of ineligibility listed in section 245(c) (principally unauthorized work and failure to maintain status). INA § 245(i).

To qualify for benefits under section 245(i), an individual must meet certain requirements regarding date of filing and date of physical presence in the United States. Specifically, the individual:

-must have been the beneficiary of a visa petition or application for labor certification which was filed on or before April 30, 2001; and

-must have been physically present in the U.S. on December 21, 2001 (unless the visa petition or labor certification was filed by January 14, 1998). Id.

Note that the physical presence requirement does not apply to those cases in which the visa petition or labor certification that grandfathers the applicant is very old. Id. That is, if it was filed by January 14, 1998. Id. Also, the physical presence requirement does not apply to the spouses and children of the principal applicant in any case.

"Grandfathering" is the term that is used to describe the process by which an individual gains the benefit of section 245(i) by virtue of one of these old visa petitions or applications for labor certification. Note that the visa petition or application for labor certification which provides the grandfathering protection need not be the one that the applicant is using to adjust status. However, to bestow the grandfathering protection of 245(i), the petition or labor certification must have been "approvable when filed." See Matter of Butt, 26 I&N Dec. 108, 111-17 (BIA 2013) (clarifying the requirement "approvable when filed").

The rules regarding grandfathering are contained in the regulations at 8 CFR § 1245.10. They are extremely generous, especially with respect to spouses and children. Even former spouses and aged-out children may retain the benefit of 245(i) protection in certain situations. See Matter of Estrada, 26 I&N Dec 180, 185 (BIA 2013). This does NOT mean that former spouses or aged out children can immigrate or adjust status on the basis of the old petition if they are no longer married to the principal applicant or if they have become too old to qualify as a derivative child. Id. It means that they carry the lasting benefit of section 245(i) protection with them. They can use this to pay the $1000 penalty and be forgiven for entry without inspection, unauthorized work or falling out of status when they apply to adjust status in their own right, such as through another visa petition by another relative or employer.

In adjustment of status cases before the Immigration Court, it is common that an individual may be the beneficiary of more than one visa petition. He or she may use one visa petition, such as one by a U.S. citizen spouse, to seek adjustment without having to wait under the quota AND also use another older petition for grandfathering under section 245(i). For example, 245(i) protection would allow the spouse of an LPR to pay the $1000 penalty and adjust even though he or she had worked without authorization or fallen out of status. INA § 245(i). It would also allow an immediate relative who entered without inspection to pay the $1000 penalty and overcome that disqualification for adjustment of status. Id.

Note that 245(i) cures entry without inspection, unauthorized work, and failure to maintain status. It does NOT cure the grounds of inadmissibility listed in section 212(a) such as for fraud, crimes or unlawful presence. 8 CFR § 1245.10(m). These grounds of inadmissibility must be cured by a waiver which corresponds specifically to the ground of inadmissibility. This is discussed in more detail below.

For example, if an individual committed fraud such as by lying to obtain a nonimmigrant visa which he used to make an inspected entry to the U. S., he or she is inadmissible for fraud or misrepresentation under section 212(a)(6)(C)(i). This person cannot cure that fraud through 245(i). He or she can only cure this fraud by applying for and qualifying for the waiver for fraud or misrepresentation which is contained in section 212(i). Note that each waiver has its own set of requirements which are listed in the statute and which vary from one section to another.

B. INA Section 245(k)

Employment-based adjustment cases are not common in the Immigration Court. When we do see these applications, they often involve section 245(i) or section 245(k). Section 245(k) is another ameliorative provision which applies only to employment-based adjustment of status cases. It applies to people who, on the date of filing the adjustment application:

- have made a lawful entry and
-thereafter, have NOT, for more than 180 days, failed to maintain status, engaged in unauthorized work or otherwise violated the terms and conditions of admission. INA § 245(k).

Thus, section 245(k) cures a brief period (up to 180 days) of these status violations. Usually, this applies to violations of nonimmigrant status, often one which authorizes employment under specific circumstances such as H-1B status, L-1 status, TN status, etc. This provision, along with the regulation at 8 CFR § 1245.2(a)(5)(ii), may enable some individuals to qualify to adjust status in the Immigration Court even though they were denied by CIS. This regulation provides that an individual who is renewing an adjustment application before an Immigration Judge need NOT meet the requirements of INA § 245(c) (regarding being in status and no unauthorized work), PROVIDED those requirements were met when the respondent initially filed the adjustment application with CIS.

VI. Derivatives: Family Members of Adjustment Applicants

Derivatives are the spouses and children of the principal applicant. The general rule is that they are able to immigrate in the same category as the principal applicant, provided they still qualify as a spouse or child at the time of immigration (adjustment of status or obtaining an immigrant visa by consular processing).

All of the preference categories, in both the family and employment-based preferences, have derivatives. However, immediate relatives do not have derivatives. This means that each immediate relative (spouse, parent or child of a US citizen) must be the beneficiary of his or her own visa petition.

For adjustment of status, each derivative must also meet the eligibility requirements of section 245(a) and must not be disqualified under the grounds listed in section 245(c) or be inadmissible under section 212(a). Thus, even though an entire family may rely on one visa petition as the basis for immigration in a preference category, when it comes to evaluating eligibility for adjustment of status, each family member must meet the criteria to adjust. If a family member does not meet the criteria, he or she must be able to cure the ineligibility through section 245(i) or by filing the appropriate application for a waiver of inadmissibility.

To qualify as a derivative child, the applicant must meet the definition of child which is contained in section 101(b)(1) of the INA. Note that there are special requirements listed in section 101(b)(1) for step-child, adopted child, and out-of-wedlock child (in certain circumstances). Note that the definition of child applies to an individual who is under 21 and

unmarried. Id. Thus, even though an individual may be considered an adult under state law at age 18, he or she may still meet the immigration definition of child up until age 21, as long as he or she does not marry. Id.

The Child Status Protection Act (CSPA), Pub. L. No. 107-208, 116 Stat. 927 (2002), created a formula which allows children who turn 21 during the immigration process to continue to be treated as children to avoid their being "aged out" and separated from the rest of their families. See Child Status Protection Act (CSPA), USCIS.GOV, https://www.uscis.gov/greencard/child-status-protection-act (last visited January 18, 2018).

VII. Typical Contents of the Adjustment Application

In the case of an adjustment of status application, you will usually see the following:

-Visa Petition Approval Notice (Form I-797)—This indicates the category of immigration, such as immediate relative or in the case of a preference immigrant, it shows the priority date.
-Application for Adjustment of Status (Form I-485)
-Biographic Information Form (Form G-325)
-Identity Documents showing the relationship between the applicant and the petitioning relative. For example, the marriage certificate and a US birth certificate for the petitioning spouse.

-Affidavit of Support (Form I-864 in family based cases) + tax returns and identity documents of the sponsor
-Copy of Passport/I-94 showing inspected entry or
-Form I-485A +$1000 penalty for 245(i)
-Medical Evaluation by recognized provider
-Waiver Application (Form I-601) if applicable
-Receipts for Payment of Filing Fees (unless there is a fee waiver)

VII. Grounds of Inadmissibility, Solutions and Waivers Often Combined with Adjustment of Status

A. Crimes

1. Waiver Under INA Section 212(h)

This waiver is for criminal convictions which would otherwise bar adjustment. It is only available to waive the criminal grounds of inadmissibility listed in INA § 212(a)(2)(A)(i)(I), (B), (D), and (E). INA § 212(h). Thus, it is generally used to waive crimes involving moral turpitude, multiple offenses with an aggregate sentence of 5 years or more, prostitution and commercialized vice, and the rare case of criminal activity for which someone has asserted immunity. Note that this waiver does NOT waive most drug crimes. The only controlled substance offense that it waives is one offense for simple possession of 30 grams or less of marijuana. Id.

There are two basic ways to qualify for this waiver: the hardship route and the rehabilitation route. Id. The specific requirements are set forth in section 212(h) and include a third route for VAWA self-petitioners, which is not discussed here. Id. The most common route (the hardship route) requires that the applicant be the spouse, parent, son or daughter of a US citizen or a lawful permanent resident who would suffer extreme hardship if the applicant were denied admission (adjustment of status). INA § 212(h)(1)(B).

The applicant has the burden of proving his/her relationship to the qualifying relative and the hardship that that relative would suffer if the waiver were to be denied. In the context of removal proceedings, this is done with documentary evidence and witnesses at the hearing.

In the alternative, the applicant may qualify for this waiver without an anchor relative under the rehabilitation route described in INA § 212(h)(1)(A). For this route, the applicant must show:

1. that the criminal activities for which he/she is inadmissible occurred more than 15 years ago;
2. that admission of this individual (or approval of adjustment of status) would not be contrary to the national welfare, safety and security of the US; AND
3. that he/she has been rehabilitated.

Whether the individual is seeking this waiver under the hardship route or the rehabilitation route, he or she may be required to meet a heightened standard in cases involving "violent or dangerous crimes." The criteria for this heightened standard is codified in the regulations at 8 CFR § 1212.7(d). Under this heightened standard, the applicant may be required to show that the denial of the application would result in "exceptional and extremely unusual hardship." Id. The regulation does not specify hardship to whom. However, the Ninth Circuit has clarified that this includes hardship to the alien in addition to hardship to relatives. Rivera-Peraza v. Holder, 684 F.3d 906, 910 (9th Cir. 2012). It has also held that this heightened regulatory standard does not alter the extreme hardship required for the threshold eligibility under the hardship route. Mejia v. Gonzales, 499 F. 3d 991, 996 (9th Cir. 2007). Rather, it supplements the threshold eligibility requirements with another layer of required hardship and applies both to waivers under the hardship route and the rehabilitation route in cases involving a violent or dangerous crime. Id.

The language of section 212(h) specifically indicates that this waiver is not available for murder or torture or for attempt or conspiracy to commit either of these acts. In general, the 212(h) waiver is available to waive aggravated felonies (other than drug trafficking crimes) if the aggravated felony is one which makes the individual inadmissible under section 212(a)(2)(A)(i)(I), (B), (D) or (E). However, it is NOT available to certain permanent residents who have been convicted of aggravated felonies.

In short, the 212(h) waiver is not available to an individual who has previously been "admitted" as a permanent resident, if, since the date of such "admission," the alien has been convicted of an aggravated felony or has not lawfully resided continuously in the US for 7 years preceding the initiation of removal proceedings. INA § 212(h)(2). The recurring issue in litigation has been whether "admission" applies to an alien who acquired permanent residence

through adjustment of status (without leaving the US), or whether this limitation only applies to those who were physically admitted into the US with an immigrant visa or after already having been granted permanent residence.

Traditionally, the Board had held that permanent residents who had been convicted of an aggravated felony were NOT eligible for a 212(h) waiver, regardless of whether they acquired permanent residence through adjustment of status or by admission after inspection at a port of entry. See Matter of Koljenovic, 25 I&N Dec. 219, 225 (BIA 2010). However in response to multiple circuit court decisions to the contrary, the Board reversed itself in Matter of J-H-J-, 26 I&N Dec. 563 (BIA 2015.) In Matter of J-H-J-, the Board held that adjustment does not mean "admission" in the context of INA § 212(h) and that therefore, the 212(h) waiver remains available to permanent residents who acquired this status by adjustment of status rather than admission at the border as an immigrant (such as after consular processing an immigrant visa). Thus, permanent residents who became permanent residents by way of adjustment of status and who have been convicted of aggravated felonies may qualify for a 212(h) waiver, provided they meet all of the statutory criteria, including 7 years of permanent residence prior to the initiation of removal proceedings. This is now the rule nationwide.

2. Stand-Alone 212(h) Waiver for a Permanent Resident with Crimes

A permanent resident may in certain circumstances apply for a stand-alone 212(h) waiver in a removal proceeding. This means that he or she may apply for the waiver as relief from removal without having to also apply for adjustment of status. This is limited to cases in which the lawful permanent resident is charged as an "arriving alien" on the notice to appear. Matter of Chavez-Alvarez, 26 I&N Dec. 274, 282 (BIA 2014). In Chavez-Alvarez, the Board explains why it considers that adjustment of status constitutes "admission" in certain circumstances. Id. (citing Matter of Rosas, 22 I&N Dec. 616, 619 (BIA 1999)). However a stand-alone 212(h) waiver cannot be sought *nunc pro tunc*. Matter of Rivas, 26 I&N Dec. 130, 134 (BIA 2013).

The eligibility criteria for the stand-alone 212(h) waiver are the same as those described above. See supra, Part VII.A.1. The applicant must qualify under either the hardship route or the rehabilitation route and may be required to meet the heightened standard for violent or dangerous crimes. Id. However, a stand-alone 212(h) waiver is simpler and does not delay the removal proceeding, in that it does not require the re-filing of a visa petition with CIS or the re-filing of an application for adjustment of status.

B. Fraud and Misrepresentation

1. INA § 212(i) Waivers for Fraud and Misrepresentation

This waiver is for fraud or material misrepresentation. This waives inadmissibility under INA § 212(a)(6)(C)(i). INA § 212(i)(1). This waiver requires a specific qualifying relative who would suffer extreme hardship if the waiver were to be denied. Id. It is ONLY available to an individual who is the spouse, son, or daughter of a US citizen or lawful permanent resident. Id. Note that the list of qualifying relatives in section 212(i) is not the same as for the 212(h) waiver. Id.; INA § 212(h)(1). This waiver is more restrictive. Here, being a PARENT of a US citizen or

permanent resident does not constitute a qualifying relationship. See INA § 212(i)(1). In other words, an applicant cannot qualify for this waiver of fraud or misrepresentation by showing that his or her US citizen child would suffer extreme hardship if the waiver were to be denied. The applicant must have a US citizen or permanent resident spouse or parent to be eligible for this waiver.

In general, hardship to a child is only relevant if it contributes to the hardship that the qualifying relative would suffer. Id. The exception to this rule is for self-petitioners under the Violence Against Women Act. Id. Petitioners under VAWA benefit from a less restrictive standard. They may qualify for a 212(i) waiver by showing extreme hardship to a US citizen or permanent resident child or parent. Id. In addition, VAWA self-petitioners may qualify for this waiver without an anchor relative by showing extreme hardship to themselves. Id.

Note that this waiver does not forgive a false claim to US citizenship. A false claim to US citizenship which is made on or after September 30, 1996 triggers the ground of inadmissibility contained in INA § 212(a)(6)(C)(ii) and cannot be waived. The 212(i) waiver covers only subsection (i) of 212(a)(6)(C). INA § 212(i)(1).

2. A Note about the 212(c) Waiver for Permanent Residents with Crimes

This is an old waiver which was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) but which continues to be revived and expanded by case law. See generally Judulang v. Holder, 132 S. Ct. 476 (2011); INS v. St. Cyr, 533 U.S. 289 (2001). A thorough discussion of this waiver is beyond the scope of this article, but it is important to note that this waiver still exists to waive criminal convictions for long term permanent residents. INS v. St. Cyr, 533 U.S. at 326.

In short, this waiver is still available to lawful permanent residents with 7 years of lawful unrelinquished domicile in two key situations. First, the waiver is available for those permanent residents with old convictions, before April 24, 1996. See Matter of Abdelghany, 26 I&N Dec. 254, 272 (BIA 2014). It also covers certain convictions up until April 1, 1997—the effective date of IIRAIRA. St. Cyr, 533 U.S. at 326. However, this is complicated by the Antiterrorism and Effective Death Penalty Act (AEDPA)—effective April 24, 1996—which made further amendments. See AEDPA § 440(d). Thus, special care must be used in evaluating 212(c) eligibility for convictions between April 24, 1996 and April 1, 1997. Abdelghany, 26 I&N Dec. at 271-272. Second, the 212(c) waiver is available to waive convictions—even recent post-IIRAIRA convictions—for individuals in *deportation* (as opposed to removal) proceedings. See generally Pascua v. Holder, 641 F.3d 316 (9th Cir. 2011); Enriquez-Gutierrez v. Holder, 612 F.3d 400 (5th Cir. 2010); Garcia-Padron v. Holder, 558 F.3d 196 (2d Cir. 2009). This waiver even covers convictions for aggravated felonies, as long as the applicant did not serve five years for such a felony. 8 C.F.R. § 1212.3(f)(4) (2014).

This waiver has been used in conjunction with an application for adjustment of status for lawful permanent residents who are deportable or removable for both drug and weapons offenses. This relief is based on the Board decision In re Gabryelsky, 20 I&N Dec. 750 (BIA 1993). With Gabryelsky relief, the 212(c) waiver waives the drug conviction and the adjustment

overcomes the firearms offense. Id. However, with the recent expansion of 212(c) availability, the adjustment application may no longer be necessary, and permanent residents in this situation may qualify for a stand-alone 212(c) waiver. See Abdelghany, 26 I&N Dec. 254.

A decision on the merits of a 212(c) waiver requires a balancing of the adverse factors against the social and humane considerations in each case. See Matter of Marin, 16 I&N Dec. 581 (BIA 1978). This framework and the factors to be considered are discussed in the seminal Board decision, Matter of Marin. See id. The factors include: family ties, residence of long duration, hardship to the respondent and family, service in the U.S. armed forces, employment history, property or business ties, service to the community, rehabilitation, and evidence of good character. Id. at 584-585. The Board explains that as the negative factors (such as the criminal record) grow more serious, it becomes incumbent on the applicant to offset them by showing favorable evidence to warrant discretionary relief under section 212(c). Id. at 585.

The legislation which repealed section 212(c), IIRAIRA, intended to replace this waiver with cancellation of removal for permanent residents. INA § 240A(a). Today, both remedies exist for permanent residents. Each of these remedies has distinct threshold requirements. However, the discretionary analysis and Marin factors are the same for cancellation of removal under 240A(a) and former section 212(c) of the INA. See Matter of C-V-T-, 22 I&N Dec. 7 (BIA 1998).

We normally see 212(c) waiver applications today for permanent residents in removal proceedings who are not eligible for cancellation of removal under section 240A(a) of the INA because they have been convicted of an aggravated felony and/or because they have a stop-time problem. A stop-time problem is one which prevents them from accumulating the requisite seven years continuous presence. INA § 240A(d)(1). Commission of certain crimes and/or the filing of the notice to appear will "stop-time" in cancellation cases. See id. This rule does not apply to waivers under section 212(c).

C. Unlawful Presence Bars and Waiver

As with crimes, fraud, and public charge, there are also grounds of inadmissibility for unlawful presence. These are contained in INA section 212(a)(9)(B) and (C). Under section 212(a)(9)(B)(i), an individual who accumulates more than 180 days, but less than one year of unlawful presence, departs the US and then seeks to reenter (or adjust status) is subject to a three-year bar. INA § 212(a)(9)(B(i)(I). An individual who accumulates a year or more of unlawful presence, departs the US and then seeks to reenter (or adjust status) is subject to a ten-year bar. INA § 212(a)(9)(b)(i)(II). This means that people who have accumulated such unlawful presence are inadmissible and ineligible for adjustment of status unless they qualify for the waiver which is also contained in this section. The waiver applies only to individuals who have a spouse or parent who is a US citizen or lawful permanent resident. To qualify for the waiver, the adjustment applicant must prove that the anchor relative would suffer extreme hardship. INA § 212(a)(9)(B)(v). These waivers may be adjudicated by an Immigration Judge in the context of an adjustment of status case. Note that this ground of inadmissibility and the

available waiver applies to people who have returned to the US with inspection, NOT to people who have reentered without inspection.

Individuals who have reentered without inspection are subject to a harsher bar, contained in INA section 212(a)(9)(C)(i). This bar cannot ordinarily be waived in the context of adjustment of status (except in very limited circumstances in the Ninth Circuit—see References for Settlement Agreement in Duran-Gonzalez). This harsher bar applies to people who have reentered without inspection after accumulating one year of unlawful presence OR after being deported. While there is a waiver for this ground of inadmissibility, it is generally not available until the person has spent 10 years outside the U.S. and then that is not adjudicated in the Immigration Court. See generally In re Torres-Garcia, 23 I&N 866 (BIA 2006).

Also note that unlawful presence is a complex term that requires careful analysis. See References for Memo by USCIS which discussed this.

D. Public Charge: Affidavits of Support

These affidavits, filed on form I-864, are required in family-based adjustment cases. INA § 213; 8 CFR § 213a. There are a few exceptions for applicants such as widows and VAWA self-petitioners. These affidavits are a vehicle for proving that the applicant is not likely to become a public charge under INA § 212(a)(4). They constitute a binding contract between the sponsor and the U.S. government. See INA § 213A.

The regulations explain how the sponsor (or combined sponsors) must show that they can support the adjustment applicant at 125% above the poverty level as shown in the Poverty Guidelines which are contained listed at the end of the affidavit of support. Id. It is important to know that some people are exempt from this requirement. This includes:

-Individuals who may be credited with 40 quarters of earnings by the Social Security Administration. Normally these are people who have worked at least 10 years in the United States, but may also include some spouses and children who can be credited with the earnings of their spouses and parents.

-Children who will become US citizens automatically upon adjustment of status. These are children of US citizens.

These exempt people do not need to file the affidavit of support. Instead, they file a form I-864W and the supporting documents.

IX. Discretion

Adjustment of status is a discretionary remedy. See generally Matter of Arai, 13 I&N Dec. 494 (BIA 1970). However, the case law makes it clear that adjustment should ordinarily be granted in the exercise of discretion. See generally Matter of Arai, 13 I&N at 494; Matter of Blas, 15 I&N Dec. 626 (BIA 1974); Matter of A-M-, 25 I&N Dec. 66 (BIA 2009).

X. Additional References

Memorandum from Johnny N. Williams in the Office of Field Operations to the Reg'l Dirs. and Deputy Exec. Assoc. Comm'r of the Immigr. Servs. Div. and the Acting Dir. of the Office of

Int'l Affairs AD 03-15 (Mar. 17, 2003) (on file with Dep't of Justice) (discussing the Child Status Protection Act).

Memorandum from Lori Scialabba, Donald Neufeld, and Pearl Chang to Field Leadership AD 07-18 (Mar. 3, 2009) (on file with Dep't of Justice) (discussing Section 212(a)(6) of the INA regarding illegal entrants and immigration violators).

See generally DAN KESSELBRENNER & LORY D. ROSENBERG, Immigr. Law and Crimes (Maria Baldini-Potermin ed., 2014).

Memorandum from William R. Yates to the Reg'l Dirs., Serv. Center Dirs., Dist. Dirs., and Nt'l Benefit Dir. HQOPRD 70/23.1 (Mar. 9, 2005) (on file with Dep't of Justice) (clarifying certain eligibility requirements pertaining to an application to adjust status under Section 245(i) of the INA).

DEP'T OF JUSTICE, EXEC. OFFICE FOR IMMIGR. REVIEW, 5 IMMIGR. LAW ADVISOR 4, ENCHANTED APRIL: LOVE, HOPE, AND SECTION 212(C) ALL SPRING ETERNAL (2011).

91 NO. 30 INTERPRETER RELEASES 1366 (2014) (discussing Duran Gonzalez v. DHS and its relation to section 212 waivers).

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